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THE POSITION OF THE ESTATE OWNER AND THE ADVERSE POSSESSOR: A COMPARISON BETWEEN ENGLAND AND WALES, SCOTLAND AND THE REPUBLIC OF IRELAND

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Abstract

This article analyses the concept of the doctrine of adverse possession by comparing the legal position of the estate owner and the adverse possessor in three legal systems, England and Wales, Scotland and the Republic of Ireland, with a view to identifying which jurisdiction offers more protection to each party. It explores the theoretical underpinnings of adverse possession in the context of the shifting priorities of land law more generally.

Keywords: Adverse possession, registered land, Land Registration Act 2002,

Introduction

*'Fondness of adverse possession should not preclude examination of whether it may operate unfairly in certain circumstances.'*²

The doctrine of adverse possession offers a mere trespasser the opportunity to acquire a better title to land than the person who 'legally' owns it, through sustained actual possession, as well as the requisite intention to possess the land. The doctrine can be traced to the Roman doctrine of *usucapio*, which is the acquisition of ownership by possession for a certain period.³ Modern adverse possession is rooted in feudal land law, the 1066 reforms of William the

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² Woods, U., 'The position of the owner under the Irish law on adverse possession', (2008), *Dublin University Law Journal*, vol.30, p.319.

³ Benton, L., Straumann, B., 'Acquiring Empire by Land: From Roman Doctrine to Early Modern European Practice', (2010), *Law and History Review*, vol.28, p.15.

Conqueror, and the concept of the feudal system of land ownership.⁴ The increasing pressure⁵ to reform the law on adverse possession led to the introduction of the Land Registration Act 2002, which limited the scope of the doctrine for registered land in England and Wales. This was the response to growing concerns that the doctrine operates unfairly,⁶ a notion which has been addressed partially, but which still affects unregistered land. This comparative piece seeks to establish what the position of the estate owner and the adverse possessor is in each of the three systems and which jurisdiction offers more protection to each party. This is supported by an analysis of the main similarities and differences between the legal systems, as well as critique of the doctrinal rules. The theoretical underpinnings of adverse possession are also investigated to gain a better understanding of the doctrine, and whether or not these arguments are still satisfactory, given their feudal period origins. Consequently, this work seeks to explore which of the three systems is the most adequate at the moment, whilst bearing in mind the shifting priorities of land law.

1 Theories and Arguments Supporting Adverse Possession

Following the highly publicised decision in *JA Pye (Oxford) Ltd v Graham*⁷, the doctrine of adverse possession has been widely criticised, not least by the judges. At first instance, Neuberger J labelled adverse possession as ‘draconian to the owner and a windfall to the squatter’⁸, and in the Supreme Court, Lord Bingham observed that adverse possession is ‘apparently unjust’.⁹ To some, the doctrine is a ‘form of control which is no longer socially approved’,¹⁰ highlighting that it has become too easy for adverse possessors to acquire land. The Land Registration Act 2002 was introduced as a response to this growing consensus. It effectively prevents the adverse possession of registered land, something which attracted little critical attention, although Martin Dixon clearly stated that there is ‘nothing inherently contradictory in having principles of adverse possession in registered land.’¹¹ The doctrine has been unaffected in unregistered land, so the historical concepts behind its validity remain unchanged and explain what considerations hold it together.

⁴ All land was and still is owned by the Crown. The Crown would give out parcels of land to the subjects, a right which became known as an estate. The holder of land would be able to give it to others in exchange for services, thus creating the tiered system of ownership.

⁵ Following the years of the litigation process and the highly-publicised decision in *JA Pye (Oxford) v Graham* [2003] 1 AC 419.

⁶ Gray, K., Gray S., *Elements of Land Law*, 5th edition (Oxford University Press, 2009) p.1166.

⁷ [2003] 1 AC 419.

⁸ [2002] Ch. 676 at para.710.

⁹ [2003] 1 AC 419 at para.2.

¹⁰ Gray, K., Gray, S., *Elements of Land Law*, p.1166.

¹¹ Dixon, M., ‘The reform of property law and the Land Registration Act 2002: a risk assessment’ (2003), *Conveyancer and Property Lawyer*, at pp.151-152.

Certainty over ownership and title is an important land law consideration. The concept of limitation is therefore crucial; otherwise there would be indefinite conflict and constant vulnerability to better claims to title. Adverse possession, in this regard, acts as a check upon the 'crippling social and legal costs which would otherwise be incurred in endless litigation over matters of title.'¹² It is in the public interest to have a known limit to litigation and that actions are pursued within a reasonable period.¹³ This evolved from a deep-seated instinct for the preservation of security in the enjoyment of land, something reflected in the Land Registry being the ultimate source of information about title and ownership.¹⁴ Certainty of title is viewed as a social need. Significant burdens would otherwise be imposed on land, with each disposition jeopardised by the encroachment of ancient or increasingly stale claims.¹⁵ Long unchallenged occupation of land should not be disturbed, as otherwise undesirable uncertainty remains. In this context, adverse possession is a compromise between considerations of moral rights and social utility. Although regarded as land-theft, there has always been merit in ensuring that land titles ultimately 'conform to lived boundaries.'¹⁶

Realism of title is another factor. The historic approach to estate ownership was not through pieces of paper, but sustained possessory control. It served as the strongest evidence of ownership and functioned not only as the authentic origin to title, but also to guarantee enjoyment of land. It provided security in possession, ease of letting and facility in conveying property.¹⁷ To the English conveyancer, title previously merely constituted evidence of possessory rights.¹⁸ In registered land, title now vests the right itself, though not absolute, as there exist informal dispositions intended to be effective and acted on, but that are not reflected on the register. Evidently, these interests have deviated from the original structure, displaced by the modern view of property as an exclusive product of a system of computerised entitlement.¹⁹

Adverse possession somewhat rests on the notion that loss should be imposed on the one 'who will suffer the least, the person whose roots are less vitally embedded in the land'.²⁰ This

¹² Gray and Gray, *Elements of Land Law*, at p.1163.

¹³ Jourdan, S., Radley-Gardner, O., *Adverse Possession*, 2nd edition (Bloomsbury Professional, 2011) p.47.

¹⁴ Cobb, N., Fox, L., 'Living outside the system? The (im)morality of urban squatting after the Land Registration Act 2002', (2007), *Legal Studies*, vol.27, p.238.

¹⁵ Gray and Gray, *Elements of Land Law*, p.1163.

¹⁶ *Ibid*, p.1164.

¹⁷ Jourdan, Radley-Gardner, *Adverse Possession* p.51.

¹⁸ *Ibid*.

¹⁹ Dixon, 'The reform of property law' p.150.

²⁰ Stake, J., 'The uneasy case for adverse possession', (2001), *Indiana University Maurer School of Law*, vol.89, p.2420.

is supported by the personhood theory,²¹ a psychological consideration developed by Margaret Radin, which provides that objects are closely bound to people and their existence and thus form a part of the way in which they constitute themselves as continuing personal entities.²² This theory has some flaws, in that it is difficult to say which party is more 'vitally embedded'. The fact that one is out of possession does not mean that he does not consider the land a part of the way in which he constitutes himself. It could very well be the true owner who is more attached to the land, as it is, after all, his land. This would appear to be the case even if the true owner acquired the land through adverse possession in the first place. Although adverse possession does sometimes operate unfairly, a title acquired through the doctrine is as good as a title acquired by will or purchase.

Social and economic considerations form additional argument. For instance, adverse possession reflects the policy that those who go to sleep on their rights should not receive judicial assistance.²³ However, landowners are not always aware of the adverse possession of their land. Public bodies in particular often have more land than they can effectively police. This supports the doctrine somewhat, as allowing the land to fall into private hands could ensure that the land is utilised and policed more efficiently. This is not always a solution and it could be argued that what is actually needed is more protection and certainty for the true owner. Furthermore, even if aware of the possession, owners may not wish to commence hostile litigation (or may be unable to), making deprivation of title simply because of delay in reclaiming possession disproportionate.²⁴

Adverse possession can be described as 'rewarding, on the expense of the sluggard, the purposeful labourer who makes constructive use of the land'.²⁵ This idea is supported by the labour-desert theory developed by John Locke, which suggests those who make use of the land are ultimately entitled to it.²⁶ There is strong encouragement of utility in land law and that land should be kept in commerce²⁷, regardless of whether those actions are undertaken by the rightful owner.²⁸ Strongly linked to this is utilitarianism, which provides that the best action is that which maximises utility.²⁹ In adverse possession, the squatter is therefore the more

²¹ Radin, M., 'Property and Personhood', (1982), *Stanford Law Review*, vol.34, p.957.

²² *Ibid.*

²³ Gray and Gray, *Elements of Land Law*, p.1164.

²⁴ Jourdan and Radley-Gardner, *Adverse Possession*, p.49.

²⁵ Gray and Gray, *Elements of Land Law*, p.1164.

²⁶ Locke, J., *Two Treatises of Government* (London, 1690).

²⁷ Jourdan and Radley-Gardner, *Adverse Possession*, p.50.

²⁸ *Ibid.*, p.49.

²⁹ Troyer, J., *The Classic Utilitarians, Bentham and Mill*, (Hackett Publishing, 2003) p.115.

welcome party, as he ensures that the land remains marketable, potentially by increasing its value.

The *Pye* litigation shows that future use is not relevant to claims of adverse possession. However, if the Lockean perspective is taken to be true, then future use is as important as current use. This is simply because future use goes against what is often referred to as 'quasi-abandonment' of the land by the true owner.³⁰ A further consideration of this perspective rests in the reality of squatting: that most will not make improvements. Commonly, the lack of prospect of acquiring title coupled with fear of eviction remove incentive to improve or maintain property. Some cases demonstrate that squatters not only make an effective use of the land, but also carry out extensive improvements, such as in *Pye and Best*.³¹ However, a recent Irish case, *Dooley v Flaherty*,³² showcases the exact opposite; the defendant lived in a house of such disrepair that the new owners were shocked to find someone actually residing there. Improvement or maintenance of the land might draw attention to the squatting, which can accelerate removal of the squatter, a prospect which is highly undesirable for the squatter. This is completely understandable, as the longer the squatter stays in possession, the more likely that his claim will succeed. However, it somewhat conflicts with the requirement that it must be open and unconcealed.³³

A more modern theory compares adverse possession to a bloodless *coup d'état*, where both are immunized from the liability for the initial invasion of another's land because both solve important moral problems. Adverse possession solves the problem of agendaless objects, just as the recognition of existing government solves the problem of stateless people.³⁴ Here, adverse possession does not merely circumvent the authority of the original owner, but displaces it by asserting its own claim.³⁵ Such moral arguments have become increasingly important in recent years because they counter moral arguments against it, mainly that squatters act immorally by trespassing. It is difficult to argue against this, as trespass is a well-established civil wrong. It is therefore understandable why most cannot comprehend how an act which is throughout its duration consistently against the law can flourish into undisputable title to property.

³⁰ Cobb and Fox, 'Living outside the system?' p.250.

³¹ *R (on the application of Best) v Chief Land Registrar* [2016] QB 23.

³² *Dooley v Flaherty* [2014] IEHC 528.

³³ *Lord Advocate v Lord Lovat* (1880) 5 App. Cas 273, at 291, 296.

³⁴ Katz, L., 'The moral paradox of Adverse Possession: Sovereignty and Revolution in Property Law', (2010), *McGill Law Journal*, vol.55, pp.51 and 72.

³⁵ *Ibid*, p.73.

A final moral argument is the theory that there is a kind of hierarchy of users when it comes to the benefit derived from land. Under this concept, adverse possession works because it ultimately confers land onto the 'highest-value user.'³⁶ This somewhat represents a clash of two important concepts – the need for land to be utilised and marketable, and the importance of certainty in the enjoyment of land. A landowner can do anything on his land, even if that includes doing nothing, which is a freedom inherent in proprietary ownership. That right is undermined by the fact that somebody else might derive a higher benefit from the land and is undermined by adverse possession altogether. As a result, it is not clear how those considerations are balanced, which is highly unsatisfactory.

The historical approaches to adverse possession are straightforward and well-constructed. However, they do not apply to the modern system, where acquisition of title through adverse possession is essentially incompatible with title-registration.³⁷ It is increasingly strange that adverse possession should have 'any relevance in a regime where registration is supposed to provide an accurate and definitive record of ownership',³⁸ although to an extent the already mentioned informal dispositions of land undermine this point of view. Current hostility and criticism towards the doctrine gives merit to restricting its operation to only those instances under Schedule 6, paragraph 5, LRA 2002. Although those apply to registered land, it does make sense to adopt them in unregistered land as well, as they bring a just outcome. Arguably, with adverse possession viewed as an immoral act of trespass at best, it would benefit from being associated with justice. It would be in the public interest to transform the doctrine into a principle that would be perceived as valid by everybody. As to 'ownerless' unregistered land, it is questionable where the immorality is in utilising unused land, especially where it is impossible to identify the owner. Unsurprisingly, most would advocate the point that adverse possession is not the right method to use, as less controversial acquisition methods exist.

2 Adverse Possession in England and Wales

Adverse possession in England and Wales differs procedurally if the land is unregistered or registered. However, possession requirements (factual possession and the intention to possess) apply equally to both types of land. Each of the elements will be considered in turn, starting with the procedural rules.

³⁶ Fennell, L., 'Efficient trespass: the case for 'bad faith' adverse possession', (2006), *Northwest University Law Review*, vol.100, p.1081.

³⁷ Cobb and Fox, 'Living outside the system?', p. 249.

³⁸ Gray and Gray, *Elements of Land Law*, p.1166.

Unregistered Land:

In unregistered land, no action shall be brought by any person to recover any land after the expiration of 12 years from the date which the right of action accrued to him.³⁹ This limitation can be prolonged by the disability (including infancy) of the paper owner.⁴⁰ The limitation period is extended for recovery actions for the Crown and the Church of England: 30 years for natural land⁴¹ and 60 years for the foreshore.⁴² The land concerned must be in possession of some natural or legal person in whose favour the period of limitation can run.⁴³ An act of adverse possession by another party is required to trigger the limitation period, as mere non-use of land cannot. Once the statutory period expires, a dispossessed owner's title to his unregistered estate is immediately extinguished.⁴⁴ The common law freehold which is held by the adverse possessor is subsequently unchallengeable. The land is still subject to all valid legal and equitable rights which pre-existed the possession, as only the paper-title is extinguished, not third-party interests which were already attached to the land. Some suggest that it is for this reason that public rights of way are, as a matter of law, immune from the principle of adverse possession.⁴⁵ The statutory period of 12 years can be accumulated by the aggregate possession of a series of squatters.⁴⁶ This possession must be strictly continuous,⁴⁷ so if squatter A abandons possession and, after some interval, squatter B begins his possession, he cannot assume the possession already established by squatter A. In those circumstances, the limitation period must start afresh.⁴⁸

Registered Land:

The LA 1980 is expressly disapplied by the provision that no period of limitation can run against any person, other than a chargee, in relation to an estate in land, title to which is registered.⁴⁹ The squatter may remain in possession for decades, but this cannot extinguish the registered proprietor's title.⁵⁰ This reflects the importance of title in modern land law, as well as that the registration of a person as a proprietor under the LRA 2002 is 'the closest thing in over 900 years to absolute ownership of land.'⁵¹

³⁹ Limitation Act 1980, s.15(1).

⁴⁰ LA 1980, s.28(1) and 32(2).

⁴¹ LA 1980, schedule 1, Part II, para.10.

⁴² LA 1980, schedule 1, Part II, para.11.

⁴³ LA 1980, schedule 1, para.8(1).

⁴⁴ LA 1980, s.17.

⁴⁵ Gray and Gray, *Elements of Land Law*, pp.1159-1160.

⁴⁶ LA 1980, s.15(1), but also *Allen v Matthews* [2007] 2 P&CR 441 at 85.

⁴⁷ *Shaw v Garbutt* (1996) 7 BPR 14816 at 14824.

⁴⁸ LA 1980, schedule 1, para.8(2).

⁴⁹ Land Registration Act 2002, s.96(1), disappling LA 1980, s.15.

⁵⁰ LRA 2002, s.96(3), disappling LA 1980, s.17.

⁵¹ Dixon, M., *Modern Land Law*, 10th Edition (Routledge, 2016), p 455.

The squatter must file an application with the Land Registry⁵² to be registered as proprietor, after a period of 10 years that immediately precedes the date of the application.⁵³ The Registry is then required to notify the current registered proprietor that an application against his estate has been made,⁵⁴ to which he is entitled to object, as long as the grounds for doing so are clearly communicated.⁵⁵ Procedurally, if no agreement can be reached by the parties, the matter is referred by the Adjudicator to the Land Registry.⁵⁶ Parties notified of the application against the estate can serve a counternotice on the Registry requiring the application to be disposed of.⁵⁷ Counternotices must be served within 65 days,⁵⁸ otherwise the applicant is statutorily entitled to be entered as the new proprietor.⁵⁹ This is unlikely, as almost all object to such applications in practice. If the squatter remains in possession for a period of two years after the rejection, he is entitled to reapply for registration,⁶⁰ and to be then registered as proprietor, irrespective of any further objections.⁶¹ Therefore, the true owner has only one chance to remove the squatter from their land and the law will not assist any further if he fails to do so.

Procedurally, there can exist another step. Immediately after the counternotice is served, the Land Registry must reject the squatter's application, unless he can prove one of the three exceptions to the right to object. The first exception is 'equity by estoppel', which applies where it would be unconscionable to dispossess the squatter.⁶² The circumstance must be such 'that the applicant ought to be registered as proprietor' of the estate.⁶³ The second exception is 'some other entitlement' to be registered. This occurs, for example, when the applicant has been in possession for 10 years, but is entitled to the land anyway, under a will or intestacy; or, he has purchased the land and has assumed possession without taking a formal transfer – he is therefore entitled to the land as a beneficiary under a bare trust. The third exception is 'reasonable mistake as to boundary' where mistaken land boundaries are assumed by neighbouring owners to be correct.⁶⁴ In certain circumstances the squatter can take over the registered land bordering upon land which belongs to him already, the exact boundaries never

⁵² LRA 2002, s.96, schedule 6, para.1(1).

⁵³ *Ibid.*

⁵⁴ LRA 2002, schedule 6, para.2(1).

⁵⁵ LRA 2002, s.73(1).

⁵⁶ LRA 2002, s.73(3).

⁵⁷ LRA 2002, schedule 6, para.3(1).

⁵⁸ LRA 2002, schedule 6, para.3(2).

⁵⁹ LRA 2002, schedule 6, para.4.

⁶⁰ LRA 2002, schedule 6, para.6(1).

⁶¹ LRA 2002, schedule 6, para.7.

⁶² LRA 2002, schedule 6, para.5(2)(a).

⁶³ LRA 2002, schedule 6, para.5(2)(b).

⁶⁴ LRA 2002, schedule 6, para.5(4)-(5).

having been properly fixed,⁶⁵ which is common in practice due to limitations of traditional mapping techniques. The squatter must be in possession for the requisite period of 10 years, reasonably believe the land to be his own,⁶⁶ and the estate in question must be registered for at least one year before the application is submitted.⁶⁷

Once the adverse possession is successful, rather than extinguishing the old title, the registration of the squatter as the new proprietor extinguishes and replaces the common law freehold acquired through initial possession.⁶⁸

Factual Possession:

Factual possession is the physical element required to be demonstrated by the squatter. Widely recognised as a 'complete and exclusive physical control' over the land,⁶⁹ it must be 'open, notorious and unconcealed,'⁷⁰ so that the true owner would notice it upon a reasonably careful inspection of the land. This gives owners an opportunity to challenge the possession before it becomes a threat to title, although arguably certain owners would be unable to notice adverse possession, such as the sick or elderly, who do not have the facilities to effectively watch their land. Nevertheless, openness strengthens an adverse possession claim, whereas concealment works against it.⁷¹ No occupancy which is concurrent to that of the paper owner can support a claim of adverse possession.⁷² Possession can only count as adverse if during the relevant period, the paper owner had available to him, but did not use, an effective right of entry. For instance, the mere non-payment of rent under a lease does not render the tenant an adverse possessor. Adverse possession cannot be consensual, and so is never adverse if enjoyed under a lawful title,⁷³ or by licence.⁷⁴ If the scope of the licence is significantly exceeded, the fact that the initial entry was under permission will not prevent commencement of adverse possession.⁷⁵ However, it has been suggested that a former licensee may lack the sufficient intention to possess during the immediate aftermath of the licence's expiry, especially if he is in the process of negotiating a renewal.⁷⁶

⁶⁵ LRA 2002, schedule 6, para.5(4)(a)-(b).

⁶⁶ LRA 2002, schedule 6, para.5(4)(c) and (5).

⁶⁷ LRA 2002, schedule 6, para.5(4)(d).

⁶⁸ LRA 2002, schedule 6, para.5(1).

⁶⁹ As per Slade J in *Buckinghamshire Country Council v Moran* [1990] Ch. 623 and Lord Browne-Wilkinson in *JA Pye (Oxford) Ltd v Graham* [2003] 1 AC 419.

⁷⁰ *Lord Advocate v Lord Lovat* (1880) 5 App. Cas 273, at 291 and 296.

⁷¹ Gray and Gray, *Elements of Land Law*, p.180.

⁷² *Treloar v Nute* [1976] 1 WLR 1295 at 1300.

⁷³ *BCC v Moran*, [1990] Ch. 623, at 636.

⁷⁴ *JA Pye (Oxford) v Graham*, [2003] 1 AC at 37.

⁷⁵ *Ibid*, at 59

⁷⁶ *BCC v Moran* [1990] Ch. 623, at 706.

Only signed, written acknowledgment of the owner's title stops the period of possession at the date of that acknowledgment,⁷⁷ unless it is expressly stated as 'without prejudice',⁷⁸ in which case it cannot be treated as evidence. Any oral acknowledgment alone is insufficient, though it can assist to demonstrate a lack of the requisite intention.⁷⁹ Arguably, that makes the owner's position more difficult, because a squatter is very unlikely to write and sign something that acknowledges he is not in possession, as that destroys his claim altogether.

There is some suggestion that adverse possession must be peaceful, or peaceable,⁸⁰ in that the squatter cannot resort to unreasonable violence to keep himself in possession.⁸¹ The essence of adverse possession lies in the ability to make a possessory presence which is effective against the world, so the defence of boundaries (even aggressive) might strengthen the claim rather than weaken it.⁸² A final consideration is that as long as the squatter is in possession of an identifiable portion of land, it is irrelevant in practice that the owner has not been wholly dispossessed. However, sometimes only that portion will be awarded to the squatter, the latter remaining in the possession of the true owner.⁸³

Intention to Possess (Animus Possidendi):

The intention to possess is the mental element required to be established by the squatter. It is 'an intention, in one's name and on one's own behalf, to exclude the world at large, including the owner with the paper title',⁸⁴ as per Lords Browne-Wilkinson and Hutton in *Pye*. Initially, the squatter's ability to exclude all persons from the land is limited: 'the squatter will normally know that until the full time has run, the paper owner can recover the land from him.'⁸⁵ Importantly, there is no need to demonstrate the intention to own or acquire the land, but simply the intention to possess. It is somewhat unclear as to why the two do not go together in the modern setting, as the successful intention to possess (coupled with factual possession) vests on the squatter the right to own land. If intention to acquire an estate need not be demonstrated, then logically that should not be the result and another form of interest should be conferred instead. It is an example of preservation of the historical focus on possession, but it is questionable if such dated considerations should still dictate terms in modern law. One of the most prominent features of the English system is that there is no differentiation between innocent and wilful trespass.⁸⁶ The reason why there is no requirement of 'good faith'

⁷⁷ LA 1980, ss.29(1)-(2) and 30(1).

⁷⁸ *Tower Hamlets London Borough Council v Barrett* [2006] 1 P&CR 132 at 75-80.

⁷⁹ *JA Pye (Oxford) v Graham*, [2003] 1 AC at 679.

⁸⁰ *Browne v Perry* [1991] 1 WLR 1297 at 1301.

⁸¹ *Shaw v Garbutt* (1996) 7 BPR 14816, at 14816.

⁸² *Ibid*, at 14831.

⁸³ *Ibid*.

⁸⁴ *JA Pye (Oxford) v Graham* [2003] 1 AC, at 43 and 77.

⁸⁵ *Ibid*, at 43.

⁸⁶ *Prudential Assurance Co. Ltd. V Waterloo Real Estate Inc.* [1999] 2 EGLR 85 at 87.

is because it would considerably limit the scope of the doctrine altogether.⁸⁷ 'Bad faith' only becomes relevant in two instances: if the owner can establish that he was the victim of fraud perpetuated by the adverse possession or if he can prove that any fact relevant to his right of action was deliberately concealed from him.⁸⁸ In those circumstances, the period of limitation will not start to run until the owner could have discovered the fraud or concealment,⁸⁹ but in the absence of those, it is generally irrelevant that the owner is not aware of his dispossession.⁹⁰ The squatter must demonstrate that he 'not only had the requisite intention to possess, but made such intention clear to the world.'⁹¹ Where use of the land does not by itself show an intention to possess, it is necessary to collect evidence to demonstrate so instead.⁹² If the squatter's actions are 'open to more than one interpretation [...] the courts will treat him as not having had the requisite animus possidendi.'⁹³ In *Powell v McFarlane* itself the court declined to find the requisite intention for the claimant who began to graze his cow on another's land at the age of 14. Slade J stated that the intention of someone so young was 'not necessarily referable'⁹⁴ to any intention to dispossess and occupy the land 'wholly as his own property.'⁹⁵

The doctrine of adverse possession faced a further potential limitation under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which made squatting in a residential building a criminal offence.⁹⁶ It is questionable whether the offence is necessary at all,⁹⁷ but the legislation has been criticised mostly because it does not provide any guidance on how the offence interacts with adverse possession.⁹⁸ The case of *Best v Chief Registrar*⁹⁹ clarified this position, explaining that the enactment of section 144 did not mean to produce any collateral effect on adverse possession.¹⁰⁰ The aim of the legislation was to provide a quick remedy for stubborn squatters, not to undermine established doctrines of law.¹⁰¹ The more

⁸⁷ Admittedly, since most consider adverse possession unjust, limiting the scope could prove beneficial.

⁸⁸ (1999) 32 HLR 569.

⁸⁹ LA 1980, s.32(1).

⁹⁰ *Rains v Buxton* (1880) 14 Ch. D. 537 at 540-541.

⁹¹ *Powell v McFarlane* (1977) 38 P&CR 452 at 472.

⁹² *Ibid.*

⁹³ *Ibid.*

⁹⁴ *Ibid.*, at 478.

⁹⁵ *Ibid.*

⁹⁶ LASPOA 2012, s.144.

⁹⁷ Dixon, M., 'Criminal squatting and adverse possession: the best solution?', (2014), *Journal of Housing Law*, vol.17, p.94.

⁹⁸ *Ibid.*

⁹⁹ [2016] QB 23.

¹⁰⁰ *Ibid.*, at para.50.

¹⁰¹ Dixon, 'Criminal squatting', at p.9.7

widely applicable concept which came out of *Best* is that *ex turpi causa*¹⁰² depends entirely on circumstances, which appears to undermine this particular legal doctrine, even though the purpose of the decision was supposedly to clarify the law, not undermine another aspect of it. Additionally, the policy value of accepting some claims of adverse possession is recognised¹⁰³ by the case, no doubt because the claimant made substantial improvements to the rundown dwelling he took possession of. It is difficult to predict if the decision would have been similar if he had not.

3 Positive Prescription in Scotland

Adverse possession does not exist in Scotland, but a similar result is achieved by the Scots law doctrine of positive prescription. Positive prescription is the acquisition of rights by the passage of time, which is currently only possible for land.¹⁰⁴ There are two requirements for the acquisition of land by positive prescription: title and possession.

Title:

Positive prescription cannot apply unless there is first either a deed recorded in the Register of Sasines¹⁰⁵ or a title registered in the Land Register.¹⁰⁶ Both are often referred to as the 'foundation writ', as the doctrine must have a physical basis in a deed or title. This is the major difference, aside from the application, between the doctrines, as adverse possession does not require any proof of deed or title at all. Positive prescription cannot apply without a foundation writ, so even if one possesses a piece of land for decades, he or she can never become the owner. The Scots conveyancing system highly values the principle that land ownership should be determinable by simply consulting public registers.¹⁰⁷ Consequently, while it cannot be guaranteed that every title on the registers is valid, at minimum it is certain that anyone who has not recorded a deed or registered a title is not the owner. This is a clear parallel to registered land in England and Wales, where the need for the Land Registry to be the ultimate source of information on title and ownership has become a priority.¹⁰⁸ This need for public registers to be the ultimate source seems to be more pronounced in Scotland, because positive prescription is fundamentally rooted in the notion that one cannot possess without prior title.

¹⁰² This legal doctrine establishes that one cannot pursue a legal remedy if it arises in connection to their own illegal act.

¹⁰³ Dixon, 'Criminal squatting', at p.97.

¹⁰⁴ Scottish Law Commission, *Report on Prescription and Title to Moveable Property* (SLC No. 228, 2012).

¹⁰⁵ The register was first created by the Registration Act 1617. Sasine was the delivery of feudal property (typically land), but over time it evolved in common speech as a reference to the deeds or documents which recorded the transfer, rather than the transfer of land itself.

¹⁰⁶ Prescription and Limitation (Scotland) Act 1973, s.1(a)(b).

¹⁰⁷ Anderson, C., *Property: A Guide to Scots Law*, (W. Green, 2016), p.148.

¹⁰⁸ Cobb and Fox, 'Living outside the system?', at p.238.

Prescription can proceed on a disposition granted by a non-owner (*a non domino* disposition), but strict requirements must be met before the Keeper may accept it. These requirements¹⁰⁹ are as follows: firstly, the land in question must have already been possessed for one year by either the applicant, the grantor of the disposition on which the application is based, or both; secondly, the applicant must notify the owner, or the Crown, if no owner can be found. The person registered under this procedure is referred to as the 'prescriptive claimant'¹¹⁰ and his entry is provisional until prescription is completed.¹¹¹ The scope of positive prescription is reduced for titles registered in the Land Register, as they are map-based and therefore more definitive,¹¹² whereas deeds recorded in the Register of Sasines are mostly products of traditional mapping techniques subject to limitations such as imprecise boundary lines. The foundation writ must contain a description of the land, or at least a description 'habile to include that land',¹¹³ though those can be sometimes of very poor quality. For example, in *Suttie v Baird*,¹¹⁴ the description and boundary measurements of the property were unclear, and the shape of the plot was different from that in the deed. However, as long as the description is at all capable of being read in a manner consistent with the possession that has been undertaken, that will suffice.¹¹⁵ The process is not concerned with whether or not the grantor intended to include it in the deed, because the intentions of the parties are irrelevant.¹¹⁶ Deeds recorded on the Register of Sasines cannot be *ex facie* invalid,¹¹⁷ as otherwise they will not be a good foundation writ.¹¹⁸ One could not acquire ownership, regardless of the length of possession.¹¹⁹ A deed will sometimes be invalid when someone tries to impersonate the documented owner. Usually however, invalidity comes from failure to fulfil the requirements of the Requirements of Writing (Scotland) Act 1995, or from the disponent granting a disposition in his favour.¹²⁰

Where the deed is recorded in the Register of Sasines, prescription will also not run if the deed is forged. Regarding the Land Register, forgery is only an obstacle if the grantee was aware

¹⁰⁹ Land Registration (Scotland) Act 2012, s.43.

¹¹⁰ LR(S)A 2012, s.43(6).

¹¹¹ LR(S)A 2012, s.44(1) and (2).

¹¹² Rennie, R., 'Land registration and the decline of property law' (2010), *Edinburgh Law Review*, vol.14, p.70.

¹¹³ PL(S)A 1973, s.1(1)(a) and (b).

¹¹⁴ (1992) SLT 133.

¹¹⁵ Anderson, *Guide to Scots Law*, p.148.

¹¹⁶ *Auld v Hay* (1880) 7 R. 663.

¹¹⁷ PL(S)A 1973, s.1(2)(a).

¹¹⁸ *Watson v Shields* (1996) SCLR 31.

¹¹⁹ Anderson, *Guide to Scots Law*, p.150.

¹²⁰ *The Board of Management of Aberdeen College v Stewart Watt Youngson* [2005] CSOH 31.

of it at the time of registration.¹²¹ The narrow definition of 'forgery' means that signing one's name when one is not the owner is not forgery. However, signing somebody else's name as though one is that person is.¹²²

Possession:

Possession must be open, peaceable, without judicial interruption, continuous and for the prescriptive period of 10 years.¹²³ The openness requirement exists for notification purposes. The owner does not need to know what is actually happening, as the test is objective, requiring only that the possession not be 'clandestine'.¹²⁴ As in England and Wales, secrecy works against the possession. The acts of possession must be sufficiently open in that the owner ought to be able to notice them. For example, in *Stevenson-Hamilton's Executors v McStay (No.2)*,¹²⁵ acts of possession were minor (cutting grass, trimming hedges) and the court held that possession failed because a reasonably observant owner would not be aware that someone was trying to occupy his land.¹²⁶ The requirement that possession must be peaceable differs to England and Wales, where aggressive defence of boundaries is sometimes reasonable. In Scotland, this requirement is enshrined in statute meaning possession which is open, but maintained forcibly, will not count towards the prescriptive period.¹²⁷ Judicial interruption is defined in the Prescription and Limitation (Scotland) Act 1973 as 'the making, in appropriate proceedings [...] of a claim which challenges the possession in question.'¹²⁸ This includes any claim made in arbitration.¹²⁹ Such claims need not be successful; if the person making the claim has sufficient interest to do so, the period of prescription will be interrupted and will have to begin afresh. Continuous possession does not mean that the possessor must always be present and exercising possession. However, the gaps cannot be excessive and the possession must not be interrupted. In *Stevenson-Hamilton* possession failed because the owners themselves carried out possessory acts, such as site excavation. Positive prescription is completed after the required period of 10 years, following the recording of a deed or the registering of a title.¹³⁰ The extended period of 20 years applies to servitudes¹³¹ (such as easements), and Crown-owned land.¹³²

¹²¹ PL(S)A 1973, s.1(2)(b).

¹²² Anderson, C., *Guide to Scots Law*, p.150.

¹²³ PL(S)A 1973, s.1(1).

¹²⁴ *Wemyss' Trustees v Lord Advocate* (1864) 24 R. 216 at 229.

¹²⁵ (2001) SLT 694.

¹²⁶ *Ibid*, at para.14.

¹²⁷ Anderson, *Guide to Scots Law*, p.152.

¹²⁸ PL(S)A 1973, s.4(1).

¹²⁹ PL(S)A 1973, s.4(2)(b) and (c).

¹³⁰ *Board of Management of Aberdeen College v Stewart Watt Youngson* [2005] CSOH 31.

¹³¹ PL(S)A 1973, s.3.

¹³² *Stevenson-Hamilton's Executors v McStay (No. 2)* (2001) SLT 694.

Until the Prescription and Limitation (Scotland) 1874 Act, persons with disabilities enjoyed extended time, but the 1973 Act makes no such allowances, assuming disabled persons will have a guardian (either *de facto* or *de jure*) who will be vigilant in preventing dispossession.¹³³ This starkly contrasts the English rules, and appears naïve in assuming that almost all disabled persons have a guardian. This situation could be exploited, even by the guardian, who could be looking after the interests of the person in possession and not the interests of the owner. As with English law, possession need not be exercised by the same person for the whole period. What is required is possession by the grantee of the foundation writ, or by that person and his successors.¹³⁴ Additionally, possession need not be personal and can be exercised by anyone with the authorisation or consent to do so from the actual possessor.¹³⁵

Under positive prescription, possession requires some degree of physical control. It has been said that the physical requirement for possession is ‘possession of the character of which the thing is capable,’¹³⁶ so each case depends on its own circumstances.¹³⁷ Where a property is in a condition allowing very little active use, fairly minimal acts may be sufficient.¹³⁸ Generally, possessing a part will not lead to ownership of the whole, if possession of the remainder is retained by another, with possession normally only being acquired for the part taken.¹³⁹ The extent of possession is judged by boundary features, such as walls/fences, or natural features such as rivers. Anything falling outside of those boundaries is not normally possessed.¹⁴⁰ Where adjoining properties are both described in a way which could include the disputed area, the preferred claim will prevail. For example, in *Bain*, the pursuer used the ground for rough shooting for more than 10 years, believing the land to be his. The defenders could establish no use and so the court awarded ownership to the pursuer. The possession must be possession as if by the owner.¹⁴¹ Where possession has been taken on the basis of one right, the possessor cannot switch the basis of that possession to prejudice the grantor. *Houstoun v Barr*¹⁴² illustrates that prescription may not run if the acts carried out do not ‘clearly and unequivocally refer to the title of ownership.’¹⁴³ Here, a cottage owner claimed to have acquired ownership of an adjacent strip of land, but also used it for access to a leased field.

¹³³ Ibid.

¹³⁴ *Board of Management of Aberdeen College v Stewart Watt Youngson* [2005] CSOH 31.

¹³⁵ PL(S)A 1973, s.15(1).

¹³⁶ *Young v North British Railway Co.* (1887) 14 R. (HL) 53 at 56.

¹³⁷ Ibid, at 54.

¹³⁸ *Hamilton v McIntosh Donald* (1994) SLT 793, where shooting and dumping of gravel was held to be enough for positive prescription.

¹³⁹ *Hill v Buchanans* (1784) Mor. 14200, affirmed (1785) 3 Par. 47.

¹⁴⁰ *Bain v Carrick* (1985) SLT 675.

¹⁴¹ *Duke of Argyll v Campbell* (1912) SC 458.

¹⁴² (1911) SC 134.

¹⁴³ Ibid, at 143.

The court concluded that possession of the strip could equally well be attributed to the lease as to the ownership of title to his house. Similarly, in *Duke of Argyll v Campbell*,¹⁴⁴ the court declined to recognise the possession as sufficient, because the pursuer occupied one of the defenders' properties as a keeper and so could not demonstrate the requisite possession as an owner. As with adverse possession, good faith plays no prominent part in positive prescription. However, situations exist in which bad faith becomes relevant such as title acquisition. Acquirers are entitled to rely on the title sheet as it stands on the date of acquisition unencumbered by any right which has been omitted. Encumbrances wrongly omitted from the title sheet extinguish when the property is acquired by a party which is, in good faith, unaware of their existence.¹⁴⁵

When compared to adverse possession in England and Wales, positive prescription appears to offer the true owner more protection. Adverse possession can be interpreted as prejudicial to the true owner, especially in the context of unregistered land, where no notice is required. The Scottish rules require notice to be given from the beginning, so that all parties are aware of the situation. Positive prescription applies equally whether the deed is recorded or the title is registered¹⁴⁶, which makes the application of the rules more comprehensible. In unregistered land, adverse possession appears more advantageous to the squatter, whereas in registered land, the advantage is clearly with the owner. The result is that in both circumstances the parties are on unequal footing. Positive prescription mitigates that by requiring both title and possession from the start, so the parties are always on equal footing. In the context of positive prescription, the party which is ultimately successful in its claim is often that which makes better use of the land. As already discussed, ensuring that the land is kept marketable and in use is one of the fundamental underpinnings of adverse possession, yet it is positive prescription that appears to embody that far more successfully. That notwithstanding, positive prescription no longer makes allowances for disabled persons. Although it puts both prospective parties in a dispute on equal footing by requiring both title and possession, it fails to treat each and every pursuer or defender equally. This seems especially strange in the context of persons who do not have a guardian. Most probably will, but the reality is that some will not, because they cannot afford one, or are not disabled enough to be allowed one and so are left in a more disadvantageous situation by the law. This is interesting from the perspective of a potential human rights challenge. Some commentaries suggest that the doctrine is safe in this regard, as the dispossessed owner can dispute the

¹⁴⁴ *Hamilton v McIntosh Donald* (1994) SLT 793.

¹⁴⁵ LR(S)A 2012, s.9.1

¹⁴⁶ There is no real distinction between registered and unregistered land in Scotland, as all deeds or titles are recorded or registered in their relevant registers. This is due to the long history of registration on the Register of Sasines, dating back to the beginning of the 17th Century.

application of prescription in the courts, but also because the foundation writs are always available for public viewing, which lessens the burden on the original owner.¹⁴⁷ The fact that the doctrine does not offer more adequate safeguards for vulnerable landowners introduces doubt into the notion that it would be completely 'safe'. Arguably, those persons are still more protected than disabled owners of unregistered land in England and Wales. Although positive prescription is a more balanced process than adverse possession, it has been argued that its origin in Scotland was little more than a pretext for a 'land grab' of the rich and powerful landowners,¹⁴⁸ so even if balanced now, the foundations appear to have been introduced in order to legitimise appropriation of land never granted to the owner in the first place. Consequently, both doctrines have major flaws.

4 Adverse Possession in the Republic of Ireland

Adverse possession in the Republic of Ireland has the same foundation as adverse possession in England and Wales, as both originated in the feudal system. Although the basis is almost identical, the development has been different in some respects.

Limitation Period:

The Statute of Limitations 1957 applies equally to unregistered and registered land,¹⁴⁹ and there are no procedural differences in the application of the limitation period. Notwithstanding the status of the land, the limitation period is 12 years,¹⁵⁰ with extended periods for the State: 30 years for natural land¹⁵¹ and 60 years for the foreshore.¹⁵² Where the right of action has been concealed by the defendant's fraud or that of his agent, time will not run until the owner discovers it.¹⁵³ Mistake is treated similarly, but applies only where the basis of the action is relief from its consequences.¹⁵⁴ Time will not run until the plaintiff discovers the mistake. It is unclear if the section applies to all mistakes, or only those for which the dispossessor bears greater responsibility than the dispossessed owner.¹⁵⁵ An innocent mistake, such as where the true boundary lies, will not prevent time from running.¹⁵⁶

¹⁴⁷ McCarthy, F., 'Positive Prescription in the Human Rights Era', (2008) *Scots Law Times*, vol.3, p.18.

¹⁴⁸ Wightman, A., *The Poor Had No Lawyers: Who Owns Scotland (And How They Got It)* (Birlinn Limited, Edinburgh, 2011), p.25.

¹⁴⁹ SL 1957, s.49(1).

¹⁵⁰ SL 1957, s.13(2)(a).

¹⁵¹ SL 1957, s.13(1)(a).

¹⁵² SL 1957, s.13(1)(b).

¹⁵³ SL 1957, s.71(1) as well as *Morgan v Park Developments Ltd* [1983] ILRM 156.

¹⁵⁴ SL 1957, s.71(2) .

¹⁵⁵ Lyall, A., *Land Law in Ireland*, 2nd Edition (Sweet and Maxwell, 2000), p.894.

¹⁵⁶ *Re Jones' Estate* [1914] 1 IR 188.

Where the dispossessed owner is under a 'disability', such as being a minor,¹⁵⁷ or of unsound mind,¹⁵⁸ the action may be brought within six years from the date when the owner ceases to be under the disability or dies, whichever occurs first. This is regardless of whether the normal period has expired.¹⁵⁹ As in England and Wales, sometimes time will begin afresh. Acknowledgment of the plaintiff's title destroys any possessory title acquired by the squatter. Time starts again from the date of the written and signed acknowledgment.¹⁶⁰ Part-payment of debt secured on land may also cause time to restart, such as in the context of a mortgagee who has acquired a right to enforce the security under the mortgage against the mortgagor. When the mortgagor pays part of the secured debt, time will run afresh.¹⁶¹

Some procedural rules apply only to registered land. The Registration of Title Act 1964 provides that where any person claims to have acquired (by possession) title to registered land, he may apply to the registrar to be registered as the owner.¹⁶² The registrar, if satisfied of the acquisition, may register him as owner. Upon such registration, the title of the true owner shall be extinguished.¹⁶³ Interestingly, the Act provides that while time is running against a registered owner, the adverse possessor has an overriding interest in the land.¹⁶⁴ This includes acquired rights, or those in the process of being acquired under the SL 1957.¹⁶⁵ This offers no protection to the adverse possessor against the registered owner or an assignee, but it indicates that he has the right to evict those attempting future possession.¹⁶⁶

Elements of Possession:

The plaintiff must be someone in whose favour the period of limitation can run.¹⁶⁷ Successive adverse possession is possible in Ireland, although on more restrictive terms than in England and Wales. The successive possessor can borrow time accumulated by the original possessor if the land is passed onto him by an *inter vivos* conveyance, will or intestacy. If that period adds up to 12 years, the true owner's title will be barred.¹⁶⁸ If the original possession is abandoned, a successor cannot adopt that period, even if he takes over immediately.¹⁶⁹

Similarly to England and Wales, what constitutes adequate possession depends on circumstances. Legal possession rests on real *de facto* possession constituted by the

¹⁵⁷ SL 1957, s.48(1)(a).

¹⁵⁸ SL 1957, s.48(1)(b).

¹⁵⁹ SL 1957, s.49.

¹⁶⁰ SL 1957, ss.50 and 51.

¹⁶¹ Lyall, A., *Land Law in Ireland*, p.895.

¹⁶² RTA 1964, s.49(2).

¹⁶³ RTA 1964, s.49(3.)

¹⁶⁴ RTA 1964, s.72.

¹⁶⁵ RTA 1964, s.72(1)(p).

¹⁶⁶ Lyall, A., *Land Law in Ireland*, p.879.

¹⁶⁷ SL 1957, s.18(1).

¹⁶⁸ SL 1957, s.15(4).

¹⁶⁹ SL 1957, s.18(3).

occupier's general power and intent to exclude unauthorised interference,¹⁷⁰ as well as that possession, *prima facie*, is a title good against everyone who cannot prove a better one.¹⁷¹ There must be either discontinuance of possession by the owner, or his dispossession. Accordingly, rights of action shall accrue on the date of dispossession or discontinuance,¹⁷² with no knowledge of dispossession required.¹⁷³ Discontinuance of possession is impossible if the disputed land is incapable of use or enjoyment.¹⁷⁴ For example, in *Dundalk Urban District Council v Conway*,¹⁷⁵ a small, steep plot of wasteland beside a river was incapable of actual use or enjoyment. Discontinuance of possession is often synonymous with property abandonment, so mere non-use will not necessarily suffice. Even smallest acts of the owner will be enough to disprove intention to discontinue possession.¹⁷⁶

In this context, the owner's intended future use is an interesting feature. In England and Wales, since *Buckinghamshire County Council v Moran*¹⁷⁷ the intention of the owner is irrelevant. In Ireland, the situation is unclear. There is a notion, although not completely endorsed due to questionable clarity, that the *Leigh v Jack*¹⁷⁸ rule applies. It provides that the owner's future plans may prevent him from dispossession if the squatter's current use is consistent with those future plans. This indicates that the owner's intention is relevant, at least if known to the squatter.¹⁷⁹ The position on this matter is constantly undermined by consistent judicial criticism and inconsistent judicial application. The rule was most recently endorsed in *Dundalk* (1987), where the squatter could not establish discontinuance as he utilised the land in a way consistent with envisaged use. The most recent case undermining the endorsement was *Feehan v Leamy*¹⁸⁰ (2001), where approval of the approach in *Buckinghamshire* was shown, though some interpret it as supporting the rule in *Leigh v Jack* instead. Without a Supreme Court decision to make the position certain, the rule appears to be reluctantly retained. Dispossession overlaps with discontinuance of possession, but focuses on the squatter's actions. Dispossession acts must be inconsistent with the true owner's enjoyment of land and his intended use of it.¹⁸¹ The land's character, nature of acts done, and squatter's intention are relevant.¹⁸² For example, to adversely possess a road reserved to the grantor of a lease, it is

¹⁷⁰ *Webb v Ireland* [1988] IR 353.

¹⁷¹ *Kennan v Murphy* (1880) 8 LR Ir 285 at 293.

¹⁷² SL 1957, s.14(1).

¹⁷³ *Ibid.*

¹⁷⁴ *Leigh v Jack* (1879) 5 LR Exch. 264 at 274.

¹⁷⁵ unreported, High Court, 15 December 1987.

¹⁷⁶ Woods, U., 'The position of the owner', at p.312.

¹⁷⁷ [1990] Ch. 623.

¹⁷⁸ Adopted from the English case of the same name.

¹⁷⁹ Lyall, A., *Land Law in Ireland*, p.890.

¹⁸⁰ [2001] IEHC 23.

¹⁸¹ SL 1957, s.14(1).

¹⁸² *Wallis's Cayton Bay Holidays Camp Limited v Shell-Mex and BP Ltd* [1974] 3 All ER 575.

not necessary to make it impossible to walk or move along it. A fence with a stile for pedestrians would be sufficient.¹⁸³

It is interesting how minimal acts of the owner are treated in the context of dispossession. In the past, mere entry onto disputed land would not prevent a squatter in effective control from being in possession, unless the owner took back actual possession.¹⁸⁴ *Randall v Stevens*¹⁸⁵ illustrates this: the defendant entered a cottage the plaintiffs were adversely possessing, removing them and most of their possessions. This constituted taking back possession, even though the plaintiffs returned and continued possession on the same day. More recently, *Dooley v Flaherty*,¹⁸⁶ questioned whether minimal acts of the owner (sending in builders through the neighbour's attic and keeping the property insured) were enough to put a discontinuation to the squatter's possession. It was held that the slightest acts done by, or on behalf of, the owner would be sufficient and so the owner was not dispossessed. Academics have criticised this decision based on the facts, which were that after a lease for the property held by the plaintiff's father expired, both remained in possession, with the plaintiff continuing to after his father's death. One commentator disagreed with the reasoning, suggesting minimal acts should show that the owner never lost possession, but here the squatter already had possession by virtue of the tenancy.¹⁸⁷ It is therefore problematic to assume the true owner was not dispossessed because he was not in possession immediately before the commencement of the limitation period.¹⁸⁸ The final and most important element of possession is intention, or *animus possidendi*, which constitutes strongest evidence of dispossession. Mistaken belief that land is the squatter's own can extinguish the title of the owner,¹⁸⁹ so one need not be aware that he is adversely possessing. Discontinuation of possession is treated as abandonment of property, so the intention to possess is less vital to prove. This appears to be the case because the owner has no future use for the property.

The doctrine in Ireland seems to provide more security for the true owner when compared to unregistered land in England and Wales. Precedent suggests that it is much easier for the owner to demonstrate that the squatter has not actually adversely possessed his land. Most prominently, the squatter's use must be entirely inconsistent with the true owner's use. In England and Wales, the use could be identical and yet if the squatter has actual possession

¹⁸³ *Tottenham v Byrne* (1862) 12 Ir CLR 376.

¹⁸⁴ *Doe d Baker v Coombes* (1850) 9 CB 714.

¹⁸⁵ (1853) 2 E&B 641.

¹⁸⁶ [2014] IEHC 528.

¹⁸⁷ Mee, J., 'A minimal approach to adverse possession' (Case Comment), (2015), *The Conveyancer and Property Lawyer*, vol.5, at p.459.

¹⁸⁸ *ibid*, at p.460.

¹⁸⁹ *McMahon v Kerry CC* [1981] ILRM 419.

and the requisite intention, he will succeed. Minimal acts of the owner are the most striking contrast between the doctrines. Although subject to some criticism, *Dooley* is good law, further supporting the idea of the Irish owner being more protected, at least in the context of unregistered land where even sending in builders to carry out minor work is sufficient. Regarding registered land, English landowners are far more protected. No adverse possessor (save for the mistaken neighbour) can acquire title to registered land without alerting the real owner and jeopardising their position. Irish adverse possession applies equally to registered and unregistered land. Although less convoluted, the overall level of protection is less adequate than in England and Wales. However, there exist commentaries demonstrating that the Irish land owner is not actually less easily dispossessed in practice.¹⁹⁰ Although the future use rule has faced criticism and several proposals to change the law,¹⁹¹ it still applies. This generates even more protection for the true owner by considering what he intends to do with his property. Some commentators argue that the rule in *Leigh v Jack* is retained because of the decision in *JA Pye (Oxford) v Graham*,¹⁹² as it raised doubts over fairness of the doctrine from the owner's perspective.¹⁹³ But in *Perry v Woodfarm Homes Ltd*¹⁹⁴ the Irish courts departed from the English approach¹⁹⁵ long before the Court of Appeal rejected the rule.¹⁹⁶ This is because Irish property (particularly rural property) is often transmitted between generations via the Statute of Limitation, rather than formal representation processes.¹⁹⁷ This different factual background has been suggested as the reason why the Irish courts favour the 'implied licence theory' which forms the rule in *Leigh v Jack*¹⁹⁸ and why there is reluctance to follow the English direction. The retention of the rule can be interpreted as an attempt to ensure that, if challenged, Irish adverse possession would not violate human rights, a response no doubt triggered by the *JA Pye (Oxford) v UK*¹⁹⁹ litigation. Although there is reluctance to say so outright, a view exists that if *Pye* had been heard in Ireland, the *Grahams* would not have succeeded.²⁰⁰ This is precisely because *Leigh v Jack* applies, as well as that minimal acts of the owner demonstrate lack of dispossession.

¹⁹⁰ Woods, 'The position of the owner', particularly the conclusion at p.319.

¹⁹¹ Law Reform Commission, *Report on Land Law and Conveyancing Law: General Proposals* (LRC 30-1989) and *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP 34-2004).

¹⁹² [2003] 1 AC 419.

¹⁹³ Woods, 'The position of the owner', p.299.

¹⁹⁴ [1975] IR 104.

¹⁹⁵ The Limitation Act 1980, s.8(4) first raised doubt as to whether the rule in *Leigh v Jack* still operated in English law, a view then endorsed by the decisions in *Buckinghamshire County Council v Moran* and *JA Pye (Oxford) v Graham* respectively.

¹⁹⁶ *Buckinghamshire County Council v Moran* [1990] Ch. 623.

¹⁹⁷ *Ibid*, at 129.

¹⁹⁸ McCormack, G., 'Adverse possession – future enjoyment fallacy' (Case Comment), (1989), *Conveyancer and Property Lawyer*, May-June, at 211.

¹⁹⁹ [2007] ECHR 700.

²⁰⁰ *ibid*, p.304.

Conclusion

In terms of the adequacy of each system, any evaluation must consider current land law priorities. Historically, pragmatists viewed possessory control as strongest ownership evidence²⁰¹, something clearly derived from feudal origins. In that context, adverse possession was absolutely adequate and the retention of the unchanged doctrine is completely understandable, as it provided a suitable method of ownership attainment. The introduction of title registration caused a shift from the original position. Possession is no longer the strongest evidence; title is now the most important component, as it awards the right itself. This is because the modern view is that property is the product of a computerised system of entitlement, with the Land Registry as the ultimate information source.²⁰² Therefore, a doctrine based solely on possession cannot be an appropriate solution.

Considering current priorities, the way in which adverse possession operates in England and Wales appears most adequate. Ownership comes from the title itself and, if registered, there can be virtually no better claim to that particular piece of land. However, the doctrine is almost redundant in registered land, although it is difficult to decide if that is harmful in any real sense. Scottish positive prescription is also appropriate. The historical development of the doctrine shows that until the introduction of the Land Registration Acts, it was the most adequate system, due to the long utilisation of the Register of Sasines. A major flaw exists however, as ownership can be founded on invalid documentation.²⁰³ For the doctrine to operate fairly, safeguards allowing confirmation of foundation writ validity must be introduced, thereby reducing fraud and maintaining doctrinal integrity. Although the Irish system is reasonably well-balanced when it comes to the position of the parties, the doctrine is inadequate in light of modern land law priorities. It does not reflect title being the strongest ownership evidence, and despite the fact that the Registration of Title Act was introduced in 1964, possession retains prominence.

²⁰¹ Gray and Gray, *Elements of Land Law*, p.1166.

²⁰² Cobb and Fox, 'Living outside the system?' at p.238.

²⁰³ If it is a *non-domino* disposition or if the foundation writ is not *ex facie* invalid.